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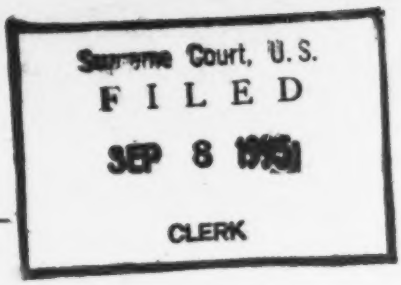

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RICHARD HOPEWELL,

Petitioner,

v.

WILLIAM DUNKER, JANET BREKKE, JOHN DOE, JANE DOE, JOHN ROE, JANE ROE, MIKE MOE, individually and in their capacities as employees of the City of Sioux Falls, CITY OF SIOUX FALLS, MIDCONTINENT BROADCASTING CORPORATION dba KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG AND VARIOUS OTHER UNIDENTIFIED PERSONS, individually and in their capacities as employees and agents of Midcontinent Broadcasting Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CORRECTED PETITTON FOR WRIT OF CERTIORARI

Richard Hopewell
Petitioner pro se.
423 South Phillips Avenue
Sioux Falls, South Dakota 57102
[605]334-0982

QUESTIONS PRESENTED

1. DID TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR LEAVE TO FILE HIS THIRD AMENDED COMPLAINT DEPRIVE PLAINTIFF OF DUE PROCESS [FRCvP 15(a)] OF LAW GUARANTEED PETITIONER BY FOURTEENTH AMENDMENT?

2. DID TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE OF APRIL 18, 1994 HEARING ON RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT DEPRIVE PETITIONER OF HIS RIGHT TO DUE PROCESS [FRCvP 56(f)] OF LAW GUARANTEED PETITIONER BY THE FOURTEENTH AMENDMENT?

3. WITH NO STATUTORY AUTHORITY, DID CITY HAVE RIGHT UNDER COLOR OF ITS POLICE POWER TO KEEP AND DISSEMINATE REPORT ON PETITIONER'S CONDUCT FOR WHICH HE HAD NOT BEEN CHARGED WITH A CRIMINAL OFFENSE AND WHEREIN HE HAD BEEN DETAINED FOR A REASON OTHER THAN AN ARREST FOR A CRIMINAL OFFENSE?

4. DID GOVERNMENT'S INTENTIONAL RELEASE OF CONFIDENTIAL RECORD ABOUT PETITIONER TO PUBLIC WHERE PROHIBITED BY STATE STATUTES INVADE PETITIONER'S RIGHT TO PRIVACY GUARANTEED BY FOURTH AMENDMENT IN VIOLATION OF EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT?

5. WHERE GENUINE ISSUE OF MATERIAL FACT HEREIN REMAINS TO BE RESOLVED BY JURY, DID TRIAL COURT ERR IN ENTERING SUMMARY JUDGMENT FOR RESPONDENTS?

6. DID DUNKER AFFIDAVIT WORK FRAUD ON STATE TRIAL COURT?

7. DOES NEWLY DISCOVERED EVIDENCE THAT RESPONDENT BREKKE'S SUBMISSION OF FALSE POLICE RECORDS ABOUT PETITIONER TO STATE TRIAL COURT WORK FRAUD ON STATE COURT AND, FOR WANT OF DISCLOSURE HEREIN BY RESPONDENTS BREKKE AND CITY OF SIOUX FALLS, ON U.S. DISTRICT COURT AND THE U.S. COURT OF APPEALS HEREIN?

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REPORTED LOWER COURT OPINIONS

Neither the Order of Dismissal (Appendix B) and Summary Judgment for Respondents made and entered by the Southern Division of the U.S. District Court of South Dakota nor the Opinion (Appendix A) and Judgment in affirmance thereof by the U.S. Circuit Court of Appeals for the Eighth Circuit are published in an official reporter.

JURISDICTION

The Judgment and Opinion (Appendix A) herein by Petitioner sought to be reviewed by this Court was made and entered by the U.S. Court of Appeals for the Eighth Circuit on June 5, 1995. Jurisdiction of this Court is by the Petitioner invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment in material part provides:

> "The right of the people to be secure in their persons, . . . papers and effects, against unreasonable searches and seizures, shall not be violated."

Section 1 of the Fourteenth Amendment in

in material part provides:

". . . [N]or shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Relative to the Federal Freedom of Information Act, 5 U.S.C. §552(b)(7)(C) provides:

". . . This section does not apply to matters that are . . . investigatory records compiled for law enforcement purposes, but . . . constitute an unwarranted invasion of personal privacy . . . ."

42 U.S.C. §1983 in material part provides:

"Every person who, under color of any statute, ordinance, . . . custom and usage, of any State . . ., subjects . . . any citizen . . . within the jurisdiction thereof to the deprivation of any rights secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

SDCL 23-5-1 in material part provides:

"The attorney general shall procure and file for record . . . information as may be pertinent of all persons who may hereafter be taken into custody for offenses other than those arising solely out of the violation of the fish, game, conservation, or traffic laws of this state with the exception of those persons charged with driving a motor vehicle while under the influence of alcoholic beverages, and also of all criminals wheresoever the same may be procured . . . ."

SDCL 1-27-1 provides:

"In every case where the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state, such record, document, or other instrument shall be kept available and open to inspection by any person during the business hours of the office or place where the same is kept."

SDCL 1-27-3 provides:

"Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept."

SDCL 23-5-10(1) provides:

"'Confidential criminal justice information,' criminal identification information compiled pursuant to chapter 23-5, criminal intelligence information, criminal investigative information, criminal statistics information made confidential pursuant to § 23-6-14, and criminal justice information otherwise made confidential by law."

SDCL 23-5-11 provides:

"Section 1-27-1 does not apply to confidential criminal justice information."

FRCvP 15(a) in material part provides:

". . . Otherwise a party may amend the party's pleading only by leave of the court . . .; and leave shall be freely given when justice so requires."

FRCvP 56(c) in material part provides:

". . . The judgment sought shall be ren-

dered forthwith if the pleadings, depositions, anwers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . ."

FRCvP 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

STATEMENT OF CASE

On May 28, 1978, Petitioner was detained by the City of Sioux Falls Police Department (SFPD) for an of record reason other than an arrest for a criminal offense. While the SFPD has no lawful authority to collect and retain in its record any data on Petitioner other than criminal offenses for which Petitioner had been arrested, the SFPD kept a microfice record of a SFPD May 28, 1978 noncriminal "incident", vis-à-vis criminal "offense", report which contained false and highly defam-

atory information about Petitioner.

On October 26, 1990, Respondent John Doe, as an employee of Respondent City of Sioux Falls, read, without the knowledge and consent of Petitioner, false and defamatory contents of said confidential report over the telephone to television news reporter Respondent Armstrong, from which information Respondent Armstrong later that day at 6:00 p.m. in error broadcast to the public that, as a result of the aforesaid incident, Petitioner had been charged and arrested for a heinous felony to the end, in conspiracy with Defendants John Doe and City of Sioux Falls, of so stigmatizing Petitioner's community reputation for bad character and immoral criminal behavior as to immediately foreclose Petitioner's opportunity to be employed as a state circuit court judge by majority vote of the Minnehaha County, South Dakota electorate in the November 6, 1990 general election.

In advance of her foregoing broadcast, Respondent Armstrong in conspiracy also sought and received from Respondents John Doe and

Jane Doe, presumably an employee of Respondent City of Sioux Falls, false and defamatory information that Petitioner had been committed to the state mental hospital, which Respondent Armstrong therein in error broadcast to the public.

Derived from the foregoing false and defamatory information provided Respondent Armstrong by Respondents John Doe, Jane Doe and John Roe, Respondent Hemmingsen on October 26, 1990 at 10:00 p.m. in error broadcast that Petitioner had allegedly been arrested for a heinous felony and turned up naked at a church.

For foregoing false defamations of Petitioner by Respondents Midcontinent Broadcasting Corporation, Hemmingsen and Armstrong, Plaintiff commenced an action against them in libel and slander in state court in November of 1990.

In a spurious attempt to circumvent the confidential status of the aforesaid May 28, 1978 SFPD incident report and therewith ex post facto change the noncriminal disposition

of said incident into an arrest for a criminal offense, Respondent Brekke, in her capacity as legal advisor to the Sioux Falls Police Department, advised police officer Respondent Dunker to collaborate with a paralegal of the law firm representing Respondents Midcontinent Broadcasting, Hemmingsen and Armstrong in production of an affidavit wherein, from his review of the May 28, 1978 incident report, Respondent Dunker imputes that Plaintiff committed a heinous felony; which libelous affidavit was, over meritorious objection by Petitioner, offered by said Respondents into evidence in the state defamation action to spuriously establish that Petitioner had been "arrested" for a heinous felony as broadcast by Respondents Armstrong and Hemmingsen.

On August 26, 1993, Respondent Brekke, without notice to Petitioner, under color of law adduced into the state court record a SFPD computer printout and a Record From Sioux Falls Police Department respectively attached as Exhibits 2 and 3 to Petitioner's

August 3, 1994 Motion herein for Rule 2 Suspension and Remand by the U.S. Court of Appeals for the Eighth Circuit to the South Dakota U.S. District Court to entertain Petitioner's Motion to Vacate Summary Judgment Pursuant to FRCvP 60(b)(2)(3); which Motion for Remand the U.S. Court of Appeals for the Eighth Circuit denied by Order (Appendix D).

In that it is herein undisputed that the SFPD computer printout contained the false entry that Petitioner had been arrested for a heinous felony on May 28, 1978 and the Record from Sioux Falls Police Department contained false entries that Petitioner had been "charged" with a heinous felony on May 28, 1978 and, in disposition of an unrelated misdemeanor offense, taken to the state mental hospital; such false police records worked fraud on the state trial court; the nondisclosure of which actions by Respondent Brekke, being material facts required for Petitioner to litigate his claims herein, worked fraud on the U.S. District Court in its dismissal of Plaintiff's §1983 claims herein and worked further fraud

on the U.S. Court of Appeals in its affirmance of the U.S. District Court's summary judgment in favor of Respondents.

The U.S. District Court's jurisdiction herein bases on 28 U.S.C. §1343 and 42 U.S.C. §1983. The U.S. Court of Appeals appellate jurisdiction bases on 28 U.S.C. §1291.

[Numbers in parentheses are pages in lower court record]

ARGUMENT

1. TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR LEAVE TO FILE HIS THIRD AMENDED COMPLAINT DEPRIVED PETITIONER OF DUE PROCESS OF LAW [FRCvP 15(a)] GUARANTEED BY FOURTEENTH AMENDMENT

FRCvP 15(a) provides that leave for a party to file an amended complaint "shall be freely given when justice so requires." As, with Allegation XIV of his Third Amended Complaint (20) in amendment of Allegation 28 in his Second Amended Complaint (16), Petitioner seeks 42 U.S.C. §1983 redress for Respondents' violations of Petitioner's right to privacy of state law enforcement investigative records not resulting in charge and arrest for a criminal offense in counterpart to right of those

investigated by federal law enforcement agencies to, by operation of 5 U.S.C. §552(b)(7)(C), not have their privacy invaded and herein creative of a similar right to privacy guaranteed by the Fourth Amendment so as to herein exhaust all of Petitioner's constitutional rights on the merits herein beyond the merits of the herein complained of violation of due process and equal protection clauses of the Fourteenth Amendment, justice herein required trial court's grant of Petitioner's Motion for Leave for Leave to File Third Amended Complaint (20). Middle Atlantic Utilities Co. v. S.M.W Development Corp., 392 F.2d 380 (CA NY 1968).

Contrary to the U.S. District Court's finding in its February 24, 1994 order denying Petitioner's Motion for Leave to File Third Amended Complaint that Petitioner failed "to file a copy of the proposed amended pleadings with the motion", and further contrary to the U.S. Court of Appeal's finding and holding in its June 5, 1995 Opinion (Appendix A) that:

"[A]s Hopewell failed to submit his proposed amended complaint with his motion to amend, the district court did not abuse its discretion in denying Hopewell's motion for leave to file his third amended complaint";

the record (20) clearly indicates that the Petitioner motioned the U.S. District:

". . . Court for an order granting Plaintiff leave to file his annexed and herewith filed and served third amended complaint in amendment of his complaint, first amended complaint and second amended complaint."

2. TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE OF 4-18-94 HEARING ON RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT DEPRIVED PETITIONER OF DUE PROCESS OF LAW [FRCvP 56(f)] GUARANTEED PETITIONER BY THE FOURTEENTH AMENDMENT

To be noted in Petitioner's Affidavit in opposition to Motions for Summary Judgment (37), evidence essential for Petitioner to herein opposed Respondents' Motions for Summary Judgment (22,25) is in the exclusive possession of the Respondents, has been withheld from Petitioner in state court proceedings and Petitioner must be given the opportunity to obtain facts essential to any further opposition to the Motions for Summary Judgment under FRCvP 56(f).

FRCvP 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

As Petititioner's Affidavit in Opposition to Motions for Summary Judgment (37) without question demonstrates why, due to the prior refusal of Respondents Midcontinent Broadcasting, Hemmingsen and Armstrong in state court proceedings to disclose the identification of Respondents John Doe, Jane Doe and John Roe so as to therewith preclude further discovery from the unidentified Respondents of facts which are material and essential to Petitioner's litigation of both the state court action and the federal court action herein, Petitioner could not at the April 18, 1994 hearing on Defendants' Motions for Summary Judgment (23,25) by affidavit present to the trial court material facts essential in Petitioner's opposition to Respondents' said Motions

for Summary Judgment; the trial court should have refused Respondents' application for summary judgment and therewith ordered a continuance of the April 18, 1994 hearing to thereafter permit Petitioner's theretofore altogether denied reasonable time and opportunity to conduct discovery by interrogatories, requests for admissions, requests for production of documents, depositions and affidavits so that the trial court could thereafter make and enter such other order than to grant Respondents' Motions for Summary Judgment as would thereafter be just on the yet to be and theretofore adjudicated facts and merits of Petitioner's 42 U.S.C. §1983 claims herein against Respondents. Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 389, certiorari denied, 428 U.S. 915 (CA8 1975).

Where Petitioner has never had a "full opportunity to conduct discovery" herein as required by Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986), the trial court abused its discretion in denying Petitioner's Motion for Continuance of Proceedings on Mot-

ions for Summary Judgment (34) supported by Affidavits (35,37,39) of Petitioner and thereafter abused its discretion in granting Respondents' Motions for Summary Judgment.

3. WITH NO STATUTORY AUTHORITY, CITY DOES NOT UNDER COLOR OF ITS POLICE POWER HAVE RIGHT TO KEEP AND DISSEMINATE REPORT ON PETITIONER'S CONDUCT FOR WHICH HE HAD NOT BEEN CHARGED WITH A CRIMINAL OFFENSE AND WHEREIN HE HAD BEEN DETAINED BY POLICE FOR A REASON OTHER THAN AN ARREST FOR A CRIMINAL OFFENSE; THE KEEPING AND DISSEMINATION OF WHICH REPORT INVADES PETITIONER'S RIGHT TO PRIVACY GUARANTEED BY THE FOURTH AMENDMENT IN VIOLATION OF THE DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT

SDCL 23-5-1 in material part provides:

> "The attorney general shall procure and file for record . . . information as may be pertinent of all persons who may hereafter be taken into custody for offenses other than those arising solely out of the violation of the fish, game, conservation, or traffic laws of this state with the exception of those persons charged with driving a motor vehicle while under the influence of alcoholic beverages, and also of all criminals wheresoever the same may be procured . . .";

from which statute Respondent City of Sioux Falls derives its police power to compile a record of criminal offenses for which Petitioner may have been arrested, charged and con-

victed. Said Respondent did not therefrom derive a police power to keep and disseminate false and defamatory contents of the noncriminal May 28, 1978 incident report (Exhibit A attached to Exhibit C in sealed envelope attached to Petitioner's Affidavit (37)) as Respondent John Roe did on October 26, 1990 to Respondents Armstrong and Hemmingsen for their television broadcasts to the public.

SDCL 23-5-10(1) provides:

> "'Confidential criminal justice information,' criminal identification information compiled pursuant to chapter 23-5, criminal intelligence information, criminal investigative information, criminal statistics information made confidential pursuant to §23-6-14, and criminal justice information otherwise made confidential by law" (emphasis added).

SDCL 1-27-1 in material part provides:

> "In every case where the keeping of a record . . . is required of an officer or a public servant under any statute of this state, such record . . . shall be kept available and open to inspection by any person during the business hours of the office or place where the same is kept."

SDCL 1-27-3 provides:

> "Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept."

SDCL 23-5-11 provides:

"Section 1-27-1 does not apply to confidential criminal justice information."

As the aforesaid May 28, 1978 noncriminal incident report was "confidential investigative information" within the meaning and by operation of SDCL 23-5-10(1), Respondent John Doe violated SDCL 1-27-3 and 23-5-11 in reading the contents of the confidential May 28, 1978 noncriminal incident report over the telephone to Respondent Armstrong for television broadcast thereafter by Respondents Armstrong and Hemmingsen; which broadcasts by conspiratorial design of all Respondents to so defame and stigmatize Petitioner's reputation as to have immediately resulted in foreclosure of Petitioner's opportunity to be employed as a state trial court judge by way of election on November 6, 1990 by popular vote of the electorate, and has since and shall forever hereafter have foreclosed any opportunity for Petitioner to earn a living as a lawyer.

Corbitt v. Andersen, 778 F.2d 1471 (CA10 1985) holds that where the state under color

of law not only defamed psychologist but created a stigma that foreclosed his opportunity to take advantage of other employment opportunities, the psychologist made out a prima facie case that his Fourteenth Amendment liberty interest had been violated by actions of the state and was actionable through 42 U.S.C. §1983. Given the heretofore denied opportunity, Petitioner can likewise herein show that defamations of Petitioner by Respondents created such stigma that Petitioner, as a direct result thereof, thereby lost his job opportunity to be a judge and he has thereby been foreclosed from any other future job opportunities as a practicing lawyer.

Where no conviction had ensued from arrest for crime and records division of city police department was by ordinance prohibited from dissemination of foregoing arrest information as police department did in violation of said ordinance, Utz v. Cullinane, 520 F.2d 467, 480-81 (CA D.C. 1975), holds:

> ". . . Due process obligates the government to accord an individual the opportunity to disprove potentially damaging al-

> legations before it disseminates information that might be used to his detriment. The proper forum for a definitively adjudicating an individual's guilt or innocence is a trial that conforms to constitutional strictures; if the government aborts that procedure . . ., the Constitution requires that he be treated as though he engaged in no criminal activity. For the government to disseminate an arrest record pertaining to the allegedly criminal episode, when it knows that employers may infer that the individual was guilty rather than innocent of the crime, effectively permits the government to inflict punishment dispite the fact that guilt was not constitutionally established."

Given the opportunity in advance of the trial court's April 19, 1994 Summary Judgment for Respondents, Petitioner would have proved that Respondents John Doe and City of Sioux Falls intentionally disseminated false and defamatory contents and false conclusions from the noncriminal May 28, 1978 SFPD incident report to television broadcaster Respondents Armstrong and Hemmingsen to the broadcasted end of falsely imputing that Petitioner had on May 28, 1978 committed a heinous crime to aforesaid Respondents' intentional bad faith end that Petitioner not gain employment as a judge in the November 6, 1990 general elect-

ion in which Petitioner was a candidate for state circuit court judge with the consequence that Petitioner will never secure employment as a lawyer nor restore to the viable private practice of law.

Utz v. Cullinane, supra at page 482 (footnote 41), further holds that the therein aggrieved parties' rights to privacy included their rights to consent to release of arrest information should have been honored by the police department at least where no conviction of said aggrieved parties had ensued and there was no countervailing government interest adjudicated to the satisfaction of a court. In the case at bar, Petitioner was never arrested or charged, much less convicted, for a crime, and Respondents John Doe and City of Sioux Falls cannot herein present any countervailing lawful interest in their release of false and defamatory confidential information falsely imputing that Petitioner had committed a crime to Respondents Midcontinent Broadcasting, Hemmingsen and Armstrong and thereafter broadcast to the public in vio-

lation of SDCL 1-27-3 and 23-5-11.

Because false and defamatory information released by Respondent City of Sioux Falls by and through its yet to be by name identified employees, Respondents John Doe, Jane Doe and John Roe, that Petitioner had greeted parishioners in the nude at a church, been charged and arrested for a heinous felony and thereafter committed to the state mental hospital to Respondents Midcontinent Broadcasting, Hemmingsen and Armstrong for their television broadcasts so highly stigmatized Petitioner with such a badge of infamy as to destroy Petitioner's reputation for character in his community, precluded Petitioner's election opportunity from securing employment as a judge on November 8, 1990, precluded Petitioner from continuing to earn a living as a sole practitioner of law and forever foreclosed Petitioner from in the future securing employment as a lawyer by a law firm, a corporation or government, Petitioner was thereby entitled, by guarantee of the Fourteenth Amendment and controlling precedent of Wisconsin v. Con-

stantineau, 400 U.S. 433, 436-37 (1971), to due process of hearing on lawfulness of the release and broadcast of confidential information in face of and contrary to statutes (SDCL 1-27-2, 23-5-10(1) and 23-5-11) prohibiting the release of which government record to the public, and notice of hearing thereon.

4. GOVERNMENT RESPONDENTS' INTENTIONAL, ARBITRARY AND UNWARRANTED RELEASE OF CONFIDENTIAL RECORD ABOUT PETITIONER TO BROADCASTING RESPONDENTS WHERE PROHIBITED BY STATE STATUTES ENACTED TO PROTECT CITIZENS FROM PUBLICATION THEREOF INVADED PETITIONER'S RIGHT TO PRIVACY GUARANTEED BY FOURTH AMENDMENT IN VIOLATION OF EQUAL PROTECTION CLAUSE OF 14TH AMENDMENT

Petitioner's civil right of privacy herein guaranteed by the Fourth Amendment is enforceable against arbitrary invasions by Respondents through due process clause of the Fourteenth Amendment. Berger v. State of New York, 388 U.S. 41 (1967); I.N.S. v. Delgado, 466 U.S. 466 U.S. 210 (1984); State of Delaware v. Prouse, 440 U.S. 648 (1979). The principal objective of the Fourth Amendment is protection of privacy rather than property, and the essential purpose of this amendment is to shi-

eld the citizen from unwarranted intrusions into his privacy as respectively held in Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) and Jones v. U.S., 357 U.S. 493 (1958).

Absent exigent circumstance, the Fourth Amendment prohibits any intrusion on a citizen's privacy without a prior judicial determination that the proposed invasion of privacy is lawful. U.S. v. Burch, 432 F.Supp. 961 (DC Del. 1977), affirmed 577 F.2d 729. The only circumstance herein that motivated Respondents John Doe, Jane Doe, John Roe and City of Sioux Falls to so release the false and defamatory contents of the noncriminal May 28, 1978 incident report together with false and defamatory incompetent opinion that Petitioner had been arrested for and charged with a felony and false and defamatory of record government information that Petitioner had greeted parishioners in the nude at a church and was thereafter committed to the state mental hospital to Respondents Midcontinent Broadcasting, Hemmingsen and Arm-

strong for their television broadcasts to the highly stigmatic extent required to grotesquely defame and irreparably damage Petitioner's character and reputation to by any means necessary foreclose any opportunity Petitioner, but for the egregious invasion of his privacy by Respondents, may have had for employment as a state circuit court judge; hardly the "exigent" circumstance required by U.S. v. Burch, to justify, as by her admitted in her below quoted answer to Petitioner's interrogatories of record in the state action, Respondent Armstrong's, without lawful authority, directly accessing the confidential criminal investigation records computer bank of the police department of Respondent City of Sioux Falls for retrieval therefrom on her private commputer screen a false and defamatory confidential printout:

> ". . . of the May 28, 1978 incident which was shown on the screen as a statutory rape. It was from that investigation that the police case report was then found on the microfiche and read to me over the telephone by Source A"*

in violation of SDCL 1-27-3 and 23-5-11 enact-

*"Source A" is Respondent John Doe.

ed by the South Dakota legislature to protect the public at large from invasions of privacy by law enforcement agencies of South Dakota.

Petitioner's mixed 4th and 14th Amendment right not to have city law enforcement without due process release confidential investigative record to media for publication should be equal to that of person who has a federal law enforcement record, the privacy of which secures by operation of the 5 U.S.C. §522(b)(7)(C) release exemption to Freedom of Information Act and therewith creates an actionable §1983 right of privacy which should not have been denied by the lower courts just because the confidential government record at issue is compiled by a municipal police department. See FBI v. Abramson, 456 U.S. 615, 631 (1982); and Strassmann v. U.S. Dept. of Justice, 792 F.2d 1267, 1269 (CA4 1986 - journalist denied access).

Violation of the equal protection clause of the Fourteenth Amendment is actionable through 42 U.S.C. §1983. Shock v. Tester, 408 F.2d 852 (CA8 1969).

By precedent of Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (CA6 1947), the

purpose of the equal protection clause is to protect every person within state jurisdiction against intentional and arbitrary breach of right to privacy statutes (SDCL 1-27-3 and 23-5-11 by government to the selective sole detriment of Petitioner as a candidate for membership in an identifiable group (judges) from which group a yet to be identified government agent, at the behest of and in conspiracy and collusion with a commercial television news broadcaster, acts to exclude Petitioner as a member. Equal protection requires uniform treatment of persons standing in the same relation to the governmental action at issue. Reynolds v. Sims, 377 U.S. 533 (1964). The equal protection clause is applicable to discriminatory government action in administration and enforcemen t of SDCL 1-27-3 and 23-5-11 by Respondents John Doe, Jane Doe, John Roe and City of Sioux Falls; which selective violation by said governmental Respondents herein clearly demonstrates to be violative of Petitioner's right to equal protection of his right to privacy embodied in SDCL

1-27-3 and 23-5-11 and guaranteed by the Fourth Amendment. See Britton v. Rogers, 631 F.2d 572 (CA8 1980), cert. denied 451 U.S. 939.

Judge candidates not excepted as herein unlawfully the case, when a state affords one person a right by statute, it must afford all persons the same right. Sawyer v. Sigler, 320 F.Supp. 690 (DC Neb. 1970), affirmed 445 F.2d 818.

As required by Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) to be herein actionable as a violation of the equal protection clause of the Fourteenth Amendment, Respondents John Doe, Jane Doe, John Roe and City of Sioux Falls conducted their "discriminatory" course of action in selectively excluding only Petitioner from his right to protection of SDCL 1-27-3 and 23-5-11 for the sole reason and "because of" the fact that he was a lawyer candidate to be a member of a clearly identifiable group (state circuit court judges) from which the aforesaid government Respondents unlawfully acted, in conspiracy with media Respondents

Midcontinent Broadcasting, Armstrong and Hemmingsen, to adversly effect Petitioner's opportunity to be a judge and therewith exclude Petitioner as a member thereof in invasion of Petitioner's right to privacy guaranteed by the Fourth Amendment in violation of Petitioner's right to equal protection of SDCL 1-27-3 and 23-5-11 guaranteed Petitioner by the Fourteenth Amendment; and for which Petitioner has actionable §1983 claims against both the government and media Respondents herein.

5. AS GENUINE ISSUE OF FACT REMAINS TO BE HEREIN RESOLVED BY A JURY AS TO WHETHER RESPONDENTS INTENDED TO VIOLATE SDCL 1-27-3 AND 23-5-11, SUMMARY JUDGMENT WAS IMPROPERLY ENTERED BY TRIAL COURT IN ITS FAILURE TO COMPLY WITH FRCvP 56(C)

In examining a motion for summary judgment, the trial court must first determine whether any material factual issues exist which can only be resolved by a trial on the merits thereof. U.S. v. Allen, 578 F.2d 236 (CA9 1978); see also Roterman v. U.S. Steel, 472 U.S. 1139 (CA8 1973). Where trial court grants summary judgment, there must be no genuine issue of any material fact, and the moving party must

be entitled to judgment as a matter of law. Ozark Air Lines v. Air Line Pilot Ass'n, 577 F.Supp. 487 (DC Mo. 1983). As genuine issues of fact remain to be herein resolved by a jury as to whether the government Respondents, in releasing the confidential contents of the noncriminal May 28, 1978 incident report, "intended" to exclude Petitioner from being a member of identifiable group (judges) by selective non-enforcement of SDCL 1-27-3 and 23-5-11 to sole detriment of Petitioner; trial court erred in granting summary judgment for Respondents.

6. DUNKER AFFIDAVIT FRAUDULENTLY CHANGES NONCRIMINAL INCIDENT REPORT INTO ARREST FOR CRIMINAL OFFENSE IN EX POST FACTO CORROBORATION OF RESPONDENTS' BROADCAST THAT PETITIONER HAD BEEN ARRESTED AND CHARGED FOR HEINOUS FELONY AND COMMITTED TO STATE MENTAL HOSPITAL

Due to 30 page limitation for this petition, Petitioner has to rest on above argument.

7. NEWLY DISCOVERED EVIDENCE THAT RESPONDENT BREKKE RELEASED FALSE AND DEFAMATORY CONFIDENTIAL INFORMATION TO STATE COURT THAT PETITIONER HAD BEEN CHARGED AND ARRESTED FOR CRIME AND TAKEN TO STATE MENTAL HOSPITAL WORKED FRAUD ON STATE COURT AND, FOR WANT OF DISCLOSURE THEREOF HEREIN, THE LOWER COURTS HEREIN

On August 26, 1993, Respondent Brekke, without notice to Petitioner, under color of law adduced into the state court record a SFPD computer printout containing the undisputed false entry that Petitioner had on May 28, 1978 been arrested for statutory rape and another SFPD record with the undisputed false entries that Plaintiff had been "charged" with a heinous felony on May 28, 1978 and, in disposition of an unrelated misdemeanor, taken to the state mental hospital. Such falsified police records worked fraud on the state trial court to the total prejudice of Petitioner's state action, the nondisclosure of which tortious conduct by Respondent Brekke, being material facts required for Plaintiff to herein fully litigate his claims against Respondents Brekke and City of Sioux Falls, worked fraud on the lower U.S. District Court in its uninformed dismissal of Petitioner's §1983 claims herein against Respondents Brekke and City of Sioux Falls.

By precedent of Borunda v. Richmond, 885 F.2d 1384 (CA9 1988), the foregoing falsified police records transmitted by Respondents Brek-

Re and City of Sioux Falls to the state trial court and not disclosed to the U.S. District Court in advance of it April 19, 1994 Summary Judgment for Respondents are herein actionable against said Respondents by remedy of §1983 even if the undisputed falsification and dissemination of confidential records resulted from "simple negligence" of said Respondents.

CONCLUSION

As the Court of Appeals' decision that:

1. privacy of false and defamatory police record whereon no criminal charge was filed is not a fundamental right conflicts with Wisconsin v. Constantineau, Utz v. Cullinane and Borunda v. Richmond, supra, and the strongly implied holding of Paul v. Davis, 424 U.S. 693, 702, 705 (1976) that Petitioner's herein destroyed right to make a living as a result of the unlawfully published false charges that Petitioner committed a crime is creative of a fundamental right, actionable through §1983, not to be herein intruded upon by government; and

2. selective non-enforcement of privacy statutes because Petitioner was a lawyer seeking election as a judge is not violative of equal protection clause conflicts with Reynolds v. Sims and Mass. v. Feeney, supra;

Petitioner this September 5, 1995 prays that the Court grant his Petition for Writ of Certiorari.

Richard Hopewell
Petitioner pro se.
423 South Phillips Avenue
Sioux Falls, So. Dak. 57102

APPENDIXES

[APPENDIX A]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2286

Richard Hopewell, Appellant, v. William Dunker, et al. Appellees.	* * * * * * * * *	Appeal from the United States District Court for the District of South Dakota. [UNPUBLISHED]

Submitted May 23, 1995 - Filed June 5, 1995

Before WOLLMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

PER CURIAM.

Richard Hopewell appeals from the district court's grant of summary judgment to all defendants in his 42 U.S.C. § 1983 action. We affirm.

In the fall of 1990, Hopewell, an attorney, was a candidate for state court judge in Sioux Falls, South Dakota. On October 26, several weeks before election day, Jessica Armstrong and Steve Hemmingsen, television news reporters for KELOland News, owned by Midcontinent Broadcasting Corporation (the "media" defendants), aired a story about Hopewell, disclosing the details of Hopewell's arrest on May 28, 1978, on charges that were eventually dropped. Hopewell lost the election. Hopewell brought a

state court action for libel against the media defendants, which ended in a summary judgment for these defendants.

Hopewell then brought the present action, alleging that the media defendants conspired with unidentified City of Sioux Falls employees to disclose his arrest record and that the disclosure denied his equal protection. Hopewell also alleged that defendants Sioux Falls police officer William Dunker, city attorney Janet Brekke, and Midcontinent Broadcasting violated his equal protection rights by disclosing the same information in Hopewell's state libel action; and that both disclosures violated his substantive and procedural due process rights. The district court granted summary judgment, finding no constitutional right of Hopewell's implicated.

We review de novo the district court's grant of summary judgment; where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. See Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1405-06 (8th Cir.1990). "Section 1983 'is

not a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Albright v. Oliver, 114 S.Ct. 807, 811 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144, n.3 (1979)).

Hopewell's equal protection claims fail. First, he did identify a suspect classification or an infringed fundamental right. See MSM Farms, Inc. v. Spire, 927 F.2d 330, 332 (8th Cir. 1991) (where no suspect class or fundamental right involved, classification is presumed constitutional and subject to only rational basis scrutiny). Second, Hopewell does not explain how he was treated differently from others similarly situated. See Abdullah v. Gunter, 949 F.2d 1032, 1037 (8th Cir. 1991), cert. denied, 112 S.Ct. 1995 (1992) (equal protection plaintiff must show he was similarly situated to others, yet treated differently).

As to Hopewell's substantive due process claims, the disclosure of arrest records, such as those disclosed in the present case, ordinarily does not infringe upon any fundamental right to privacy. See Paul v. Davis, 424 U.S.

693, 713 (1976) (declining to establish fundamental privacy right in one's arrest records); Scheetz v. The Morning Call, Inc., 946 F.2d 202, 206 (3rd Cir. 1991). We also find no basis for Hopewell's contention that the South Dakota statutes he cites gave him a liberty interest in the confidentiality of his arrest records, entitled to procedural due process protections. See Eagley v. Rogerson, 5 F.3d 325, 328 (8th Cir. 1993).

The district court did not abuse its discretion in denying Hopewell's Federal Rule of Civil Procedure 56(f) motion for a continuance, as he did not indicate the nature of the discovery he sought or how it would help him. See Humphereys v. Roche Biomedical Lab. Inc., 990 F.2d 1078, 1081 (8th Cir. 1993); United States Through Small Business Admin. v. Light, 766 F.2d 394, 397-98 (8th Cir. 1985) (per curiam). Finally, as Hopewell failed to submit his proposed amended complaint with his motion to amend, the district court did not abuse its discretion in denying Hopewell's motion for leave to file his third amended complaint. See

Clayton v. White Hall School Dist., 778 F.2d (8th Cir. 1985).

The judgment is affirmed.

[APPENDIX B]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * * * * * * * * *

RICHARD HOPEWELL, * CIV 93-4175

Plaintiff, *

vs. * ORDER OF DISMISSAL

WILLIAM DUNKER, et al.*

Defendants. *

* * * * * * * * * * * *

All pending motions came on for hearing on April 18, 1994, with the plaintiff appearing by Wendy Allison Nora, and with defendant Dunker et al. appearing by William P. Fuller and with defendant Midcontient Corp. et al. appearing by Timothy M. Gebhart, and

After arguments of counsel and upon the record,

IT IS ORDERED:

(1) That the plaintiff's Motion for Continuance of Proceedings on Motions for Summary Judgment, Doc. 34, is denied.

(2) That Dunker et al.'s Motion to Dismiss as to the City of Sioux Falls, Docs. 5, 12, 18,

and 23, will be treated as a motion for summary judgment and is granted and the plaintiff's claims against said defendants are dismissed.

(3) That Midcontinent Corp. et al's Motion to Dismiss Second Amended Complaint or Alternatively for Summary Judgment, Docs. 3, 14, 19, and 25, will be treated as a motion for summary judgment and is granted and the plaintiff's claims against said defendants are dismissed.

(4) That the Clerk of Courts shall enter judgment dismissing all of plaintiff's federal claims against all defendants with prejudice, and shall enter judgment dismissing plaintiff's pendent state claims without prejudice.

(5) That Defendants' Motion for Sanctions, Doc. 27, is denied.

Dated this 18th day of April, 1994.

BY THE COURT:

/s/ John B. Jones
Chief Judge

ATTEST: Wm F. Clayton, Clerk

By: /s/ Linda M. Ziegler
Deputy

(SEAL)

[APPENDIX C]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * * * * * * * * *

RICHARD HOPEWELL, * CIV 93-4175

Plaintiff, *

vs. * ORDER

[in material part]

WILLIAM DUNKER et al., *

Defendants. *

* * * * * * * * * * * *

After examination of the record, it appears that plaintiff's Motion For Leave to File Second and Third Amended Complaints, Doc. 20, . . . should be denied as to the Third Amended Complaint because of plaintiff's failure to comply with District of South Dakota Local Rule 15.1 by failing to file a copy of the proposed amended pleadings with the motion.

. . .

Dated this 24th day of February, 1994.

BY THE COURT:

/s/ John B. Jones
Chief Judge

ATTEST: William F. Clayton, Clerk

(SEAL)

By: /s/DeAnn Martin
Deputy

[APPENDIX D]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2286SDSF

Richard Hopewell,	*	
Appellant,	*	Appeal from the ted States District
vs.	*	Court for the Dis-
William Dunker, et al.	*	trict of South Dako- ta.
Appellees.	*	[in material part]

Appellant's motion for suspension of the appeal and for remand to the trial court is denied. See Winter v. Cerro Gordo County Conservation Board, 925 F.2d 1069, 1073 (8th Cir. 1991).

. . .

August 17, 1994

Order Entered at the Direction of the Court:

/s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
OCT 6 1995
CLERK

(3)

No. 95-440

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

RICHARD HOPEWELL,

Petitioner,

vs.

WILLIAM DUNKER, JANET BREKKE, JOHN DOE, JANE DOE, JOHN ROE, JANE ROE, MIKE MOE, MARY MOE, individually and in their capacities as employees of the City of Sioux Falls, CITY OF SIOUX FALLS, MIDCONTINENT BROADCASTING CORPORATION DBA KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG and VARIOUS OTHER UNIDENTIFIED PERSONS, individually and in their capacities as employees and agents of Midcontinent Broadcasting Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. Does this case present issues appropriate for this Court's review under a writ of certiorari?

2. Are the decisions below proper?

LIST OF PARTIES

Respondent Midcontinent Broadcasting Corporation is a wholly owned subsidiary of Midcontinent Media, Inc. Neither corporation is publicly held.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

RICHARD HOPEWELL,

Petitioner,

vs.

WILLIAM DUNKER, JANET BREKKE, JOHN DOE, JANE DOE, JOHN ROE, JANE ROE, MIKE MOE, MARY MOE, individually and in their capacities as employees of the City of Sioux Falls, CITY OF SIOUX FALLS, MIDCONTINENT BROADCASTING CORPORATION DBA KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG and VARIOUS OTHER UNIDENTIFIED PERSONS, individually and in their capacities as employees and agents of Midcontinent Broadcasting Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Richard Hopewell ("Petitioner") brought a 42 U.S.C. § 1983 action in October 1993 in United States District Court for the District of South Dakota against the City of Sioux Falls, South Dakota, and various city employees (hereafter referred to as "City"), and Midcontinent Broadcasting Corporation, d/b/a KELOLAND News, Steve Hemmingsen and Jessica Armstrong (hereafter referred to as

"KELO News") as a result of news stories broadcast in October 1990 and an ensuing state court defamation action by Petitioner against KELO News. The lawsuit was Petitioner's second attempt to seek redress for imagined wrongs committed against him when he was an unsuccessful candidate for election to a South Dakota judgeship in 1990. The events giving rise to the lawsuit began a number of years earlier.

In the spring of 1978, Petitioner, an attorney, was arrested in a Sioux Falls drugstore, where he was found stark naked. Petitioner was placed under arrest for attempted rape by the Sioux Falls Police Department. His arrest and the events preceding and following it were the subject of police records and reports with local law enforcement and mental health agencies.

Petitioner became a candidate for state judicial office in 1990. After the campaign began, his arrest was the subject of coverage by local news media. KELO News broadcast news stories about Petitioner's 1978 encounter with the police and ensuing arrest. The stories were based in part on information contained in police records.

Petitioner brought a defamation action against KELO News in state court as a result of the stories. In that lawsuit, KELO News filed an affidavit from the police officer who arrested Petitioner in 1978. It also issued a subpoena for the Sioux Falls Police Department's records, which the City turned over for *in camera* review by the state court. The court released certain records to KELO News and sealed

others. In January 1994, summary judgment was entered in favor of KELO News in the defamation action.[1]

The federal lawsuit claims Petitioner's civil rights were violated because information contained in police records was used as part of the basis for the news stories, the City allowed the arresting officer to sign the affidavit in the defamation lawsuit and turned over police records for *in camera* inspection in that action. All Defendants filed motions to dismiss for failure to state a claim. Petitioner then filed amended and second amended complaints, to which all Defendants filed renewed motions to dismiss. At least one of the motions to dismiss requested in the alternative that the District Court grant summary judgment. Petitioner responded with a motion to file a second and third amended complaint.

On February 24, 1994, the District Court entered an order allowing the second amended complaint but denying leave to file a third amended complaint because a copy of that proposed complaint was not filed with the motion as required by local court rules. The Court elected to treat the motions to dismiss as motions for summary judgment and set a hearing date.

Various affidavits and other material were submitted and Petitioner filed a motion to continue the summary judgment hearing. The District Court denied the motion to continue and granted summary judgment. It ruled KELO News was not acting under color of state law and, hence, there was no state action as required by 42 U.S.C. § 1983.

---

[1]An appeal is pending before the South Dakota Supreme Court.

The Eighth Circuit Court of Appeals affirmed in a *per curiam* opinion. A three-judge panel ruled none of Petitioner's constitutional were implicated and that the District Court did not abuse its discretion in denying Petitioner's motion to file a third amended complaint and the Rule 56(f) motion to continue the summary judgment proceedings. No petition for rehearing was filed.

ARGUMENT

Supreme Court Rule 15.2 requires counsel to draw to the Court's attention "any perceived misstatement of fact or law" that bears on the issues that would be before the Court. The Petition in this case is full of misstatements. Perhaps most flagrant is one which pervades the Petition and upon which it is predicated. The Petition begins with the assertion that on May 28, 1978, Petitioner was "detained" by police for a "reason other than an arrest for a criminal offense." Petition at 4. The fact is, however, that when Petitioner was placed in custody the arresting officer filled out an "ARREST REPORT" that specifically states Petitioner was "arrested" for "attempted rape." This also refutes Petitioner's claim that KELO News broadcast defamatory information. Defamation requires a false statement. *See* S.D. Codified Laws §§ 20-11-3, 20-11-4 (defining libel and slander as a "false" publication).

Petitioner states his proposed third amended complaint was filed with the District Court. Petition at 11. A review of the District Court record demonstrates this statement is false. He also asserts discovery information was "withheld" in the state defamation action. *Id.* This statement omits the fact the state trial court, applying rules virtually identical to the Federal Rules of Civil Procedure, ruled at least three

times that Petitioner had not made the showing necessary to obtain discovery.

I. The Issues Sought to Be Raised Do Not Merit Invoking the Court's Jurisdiction.

The factors that justify exercise of this Court's discretion to issue a writ of certiorari are not present here. For example, the first two "issues" deal with the denial of Petitioner's motions to amend his complaint and to continue the summary judgment proceedings. This Court has long recognized that whether to allow leave to amend is within the discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). Similarly, the courts of appeals agree that grant or denial of a Rule 56(f) motion is within the discretion of the district court. *See Licari v. Ferruzzi*, 22 F.3d 344, 350 (1st Cir. 1994); *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994); *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3rd Cir. 1989); *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995); *American Lease Plans, Inc. v. Silver Sand Co.*, 637 F.2d 311, 317 (5th Cir. 1981); *Bush v. Rauch*, 38 F.3d 842, 849 (6th Cir. 1994); *United States v. On Leong Chinese Merchants Association Building*, 918 F.2d 1289, 1294 (7th Cir. 1990), *cert. denied*, 502 U.S. 809 (1991); *Humphreys v. Roche Biomedical Laboratories, Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993): *California Union Insurance Co. v. American Diversified Savings Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990), *cert. denied*, 498 U.S. 1052 (1991); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995).

Here, the Eighth Circuit determined the District Court did not abuse its discretion in denying those motions.

Petitioner has not demonstrated why this Court should review that exercise of discretion. This is particularly so with respect to the ruling on the motion to amend. The basis of the District Court's ruling was Petitioner's failure to comply with local rules of court. Petition at 39. No reason exists for this Court to review the District Court's application and enforcement of its local rules.

Moreover, the denial of these motions comports with prior decisions. As noted, the discovery sought by the Rule 56(f) motion was information that was the subject of court orders entered in the defamation action under discovery rules identical to the Federal Rules of Civil Procedure. Rule 56(f) discovery is less extensive in scope than that obtained under Rule 26. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 298 (1968). If Petitioner was not entitled to discovery under Rule 26, he cannot claim entitlement by virtue of Rule 56(f). His motion was simply an improper collateral attack on the state court orders.

Similarly, in Issue 7, Petitioner claims "fraud" was worked on the state court in the defamation action. This Court, however, is not being asked to review the state proceedings and would not have jurisdiction to do so until they are concluded. *See* 28 U.S.C. § 2101(d); Sup. Ct. R. 13.1. Petitioner has a remedy under South Dakota law. S.D. Codified Laws § 15-6-60(b) allows a judgment to be set aside on the grounds of "fraud" or "fraud upon the court." Petitioner can not, however, invoke this Court's jurisdiction when he has the opportunity to raise the claims in the court in which they occurred, something he has not done. *Cf. M.W. Zack Metal Co. v. International Navigation Corp.*, 675 F.2d 525, 529 (2d Cir.), *cert. denied*, 459 U.S. 1037 (1982). *See also* 7 MOORE'S FEDERAL PRACTICE, ¶ 60.37[3] (1992).

II. The Decisions Below Are Correct.

Petitioner asserts the decisions below conflict with decisions of this Court and two federal circuit courts of appeals. The fact is the courts below properly applied existing precedent.

A. *There Was No State Action by KELO News.*

It is crucial to ask just what conduct of KELO News is claimed to have violated Petitioner's civil rights. That conduct is obtaining information from police records[2] and using that information in a news story on a judicial election. It is absurd to assert that gathering and disseminating news can constitute state action.

This is demonstrated by the analogous case of *Brooks v. American Broadcasting Cos.*, 737 F. Supp. 431 (N.D. Ohio 1990), *aff'd in relevant part, rev'd in part*, 932 F.2d 495 (6th Cir. 1991). Plaintiff sought to amend his complaint for libel and invasion of privacy against ABC News to add a claim for conspiracy to violate his civil rights. 737 F. Supp. at 433-34. The district court determined the amendment could not withstand a motion to dismiss. *Id.* at 434, 438-40. After first noting that defamation and invasion of privacy do not constitute deprivation of constitutional rights, the court found there was no state action. It said:

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[2]At least one South Dakota court has held the press has an "unquestionable[]" constitutional right of access to the very type of records at issue here. *Sioux Falls Newspapers, Inc. v. City of Sioux Falls*, Civ. 85-305, (2d Cir., July 9, 1985).

> the only substantive point made by [plaintiff] is that defendants had access to official investigatory materials in preparing their broadcast. News reporters often have access to official reports and documents to aid them in investigating and preparing a story, yet that alone does not convert these acts into state action. To hold otherwise would be to render many actions by news agencies state actions and this would dilute the historic disassociation between the news media and government. The facts as alleged merely demonstrate defendants were acting as any news reporting organization typically does and this does not constitute state action.

Id. at 440. *See also Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989) (mere publication of an article based on information obtained from government officials not alone sufficient to constitute state action); *Mimms v. Philadelphia Newspapers, Inc.*, 352 F. Supp. 862, 865 (E.D. Pa. 1972) (no state action when reporter and photographer obtained access to prison from warden because "[t]hey are newspaper people whose orbit is far from the governmental sphere and, by virtue of the first amendment, essentially insulated from it.").

Using government documents as a source of information does not convert KELO News into a state actor. There is no interdependent relationship with the City, *cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), nor is KELO News engaged in a traditional state function, *cf. Marsh v. Alabama*, 326 U.S. 501 (1946). The City does not require or encourage nor is it significantly involved in the newsgathering process. To take such a view would mean

state action exists any time a reporter reviews or uses a record maintained by a public official. To convert that into state action not only undercuts, it threatens the basic news-gathering process, a process government must be wary of intruding upon. *Cf. Janklow v. Newsweek*, 788 F.2d 1300, 1306 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986); *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir.), *cert. denied*, 115 S. Ct. 189 (1994) and cases cited therein.

B. *No Constitutional Right is at Issue.*

The main thrust of the Court of Appeals was none of Petitioner's constitutional rights were implicated. Petition at 33-35. This is correct, as is seen by reviewing the alleged violations in turn.

Petitioner first asserts disclosure of his arrest record violated his right to equal protection. Essentially, he claims general rules were applied to him in an arbitrary or discriminatory way. *Cf. Jones v. Helms*, 452 U.S. 412, 423-24 (1981). In such cases, a plaintiff must first show that, compared with others similarly situated, he was selectively treated. *See FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992). *See also Bender v. City of St. Ann*, 816 F. Supp. 1372, 1377 (E.D. Mo. 1993), *aff'd on other grounds*, 36 F.3d 57 (8th Cir. 1994). Petitioner claims only that certain information was provided to KELO News because he was a candidate for election to a judicial position. There is no assertion he was treated differently than others similarly situated. In fact, if other judicial candidates or their family members appeared in public in the nude or were arrested for attempted rape, there would likely be press coverage of those events, too. *Cf. In re Hughes County Action No. Juv. 90-3*, 452 N.W.2d 128, 131 (S.D. 1990) (detailing extensive press

coverage given juvenile case involving alleged incident at governor's residence). Thus, he fails the most basic element of any equal protection claim.

Second, what the Equal Protection Clause prohibits is selective enforcement based on an "unjustifiable standard such as race, religion or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). It is not enough for a plaintiff to show he was treated unfairly as an individual; rather, the particular course of action must have been taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects *upon an identifiable group.*" *Huebschen v. Department of Health and Social Services*, 716 F.2d 1167, 1171 (7th Cir. 1983) (*quoting Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979)) (emphasis in original). *Accord, Trautvetter v. Quick*, 916 F.2d 1140, 1150-52 (7th Cir. 1990). *See also Cook v. Ashmore*, 579 F. Supp. 78, 85 (N.D. Ga. 1984) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). *Cf. Stern v. Sommerville Communications Corp.*, 529 F. Supp. 29, 30-31 (E.D. Mich. 1981) (holding no claim exists under 42 U.S.C. § 1985(3) against newspaper for alleged conspiracy with school system officials to violate a minor's civil rights absent class-based animus). Petitioner's "class" is evidently candidates for judicial office. Even constitutional law, though, treats candidates for public office differently than private individuals. *See New York Times v. Sullivan*, 376 U.S. 254 (1964) (imposing stricter burden of proof on public officials in libel actions). *See also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971). Any different treatment, though, is not based upon animus. Rather, it is based on the fact the individual is seeking a position of public trust, confidence and authority.

Petitioner also asserts that disclosure of this embarrassing information violated his substantive and procedural due process rights. The result here is dictated by a decision of this Court mentioned only in passing by Petitioner -- *Paul v. Davis*, 424 U.S. 693 (1976)

Even if some substantive due process right is implicated,[3] *Paul* holds that release of criminal records does not violate substantive due process. In rejecting a substantive due process claim in connection with the posting of plaintiff's name and photograph on a list of "active shoplifters," this Court noted that the plaintiff

> claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of any official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

424 U.S. at 713. *Accord*, *Wade v. Goodwin*, 843 F.2d 1150 (8th Cir.), *cert. denied*, 488 U.S. 884 (1988); *Tosh v. Buddies Supermarkets, Inc.*, 482 F.2d 329, 332 (5th Cir. 1973); *Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969); *Lahaza v. Azeff*, 790 F. Supp. 88, 93 (E.D. Pa. 1992).

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[3]"The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 114 S. Ct. 807, 812 (1994).

Paul likewise held that the interest in reputation is not a liberty or property interest protected by the Due Process Clause. It said:

> the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized in [the Court's procedural due process] decisions. [State] law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions.

424 U.S. at 711-12. Similarly, South Dakota law does not grant Petitioner any legal guarantee of present enjoyment of his reputation. Rather, South Dakota provides him, like any other citizen, protection of his reputation via its tort law and an action for damages. *See* S.D. Codified Laws Chap. 20-11. Petitioner has already pursued this avenue of relief without success.

KELO News would finally note that Petitioner freely cries conspiracy. "Blind allegations" of conspiracy, though, are insufficient to withstand dispositive motions. *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987). Moreover, a § 1983 plaintiff must establish the deprivation of a protected right because it is the deprivation, not the conspiracy, that is the essence of the claim. *See Dixon v. City of Lawton*, 898 F.2d 1443, 1449 (10th Cir. 1990);

Farrar v. Cain, 756 F.2d 1148, 1151 (5th Cir. 1985). As detailed above, there is no deprivation here.

CONCLUSION

Respondents Midcontinent Broadcasting Corporation, d/b/a KELOLAND News, Steve Hemmingsen and Jessica Armstrong request the Court deny the Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and because the decisions below were proper.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 6 1995
CLERK

No. 95-440

In The

Supreme Court of the United States

October Term, 1995

RICHARD HOPEWELL,

Petitioner,

v.

WILLIAM DUNKER, JANET BREKKE, JOHN DOE, JANE DOE, JOHN ROE, JANE ROE, MIKE MOE, MARY MOE, individually and in their capacities as employees of the City of Sioux Falls, CITY OF SIOUX FALLS, MIDCONTINENT BROADCASTING CORPORATION dba KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG and VARIOUS OTHER UNIDENTIFIED PERSONS, individually and in their capacities as employees and agents of Midcontinent Broadcasting Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1990, when Petitioner was running for a judicial office, the local media broadcasted information about untoward incidents occurring in 1978 which involved Petitioner. Petitioner brought suit in state court for libel. Petitioner then brought suit in federal court alleging deprivation of his constitutional rights.

1. Did the appellate court err in affirming the district court's granting of summary judgment in that the dissemination of this information:

   a. Did not violate the Petitioner's constitutional right of equal protection;

   b. Did not violate Petitioner's constitutional right of due process;

   c. Did not violate Petitioner's fundamental right to privacy.

2. Did the appellate court err in affirming the district court's decision to deny Petitioner's motion for leave to file a third amended complaint.

3. Did the appellate court err in affirming the district court's decision to deny Petitioner's motion for continuance under Federal Rule of Civil Procedure 56(f).

PARTIES

The parties to the proceedings below in the Eighth Circuit Court of Appeals were the same parties as in the original action in the United States District Court of South Dakota, Southern Division.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is unpublished. It is reprinted in Appendix A to this brief, beginning at page 1a. The Order Fixing Hearing Date, the Summary Judgment for Defendants, and Order of Dismissal entered by the United States District Court of South Dakota, Southern Division, are also unpublished and are reprinted in Appendices B, C and D to this brief. (*See* App. B at 6a; App. C at 8a; App. D at 10a.)

JURISDICTION

This action was initiated by the Petitioner, Richard Hopewell, by complaint in the United States District Court of South Dakota, Southern Division, on October 22, 1993, which invoked the jurisdiction of the federal court under a number of federal statutes, including 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. § 1343. The action was dismissed by the district court on April 18, 1994, following the entry of summary judgment for the Defendants. Petitioner filed a notice of appeal on May 18, 1994.

The opinion and order of the Court of Appeals, of which Petitioner now seeks a Writ of Certiorari, was issued on June 5, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1
42 U.S.C. § 1983
Fed. R. Civ. P. 15(a)
Fed. R. Civ. P. 56(f)
S.D. Local Rule 15.1

STATEMENT OF THE CASE

On May 28, 1978, Sioux Falls Police Officer Glenn Rivers was dispatched to the residence of Roger Ensenbach. Upon arrival, Officer Rivers was advised that Petitioner Hopewell had accosted Mrs. Ensenbach and then fled the premises in the nude. Roger Ensenbach recounted to Officer Rivers that Petitioner Hopewell had come over to the Ensenbach residence and, while Mr. Ensenbach was talking on the phone, Petitioner Hopewell took all of his clothes off and went into the master bedroom. Mrs. Ensenbach was clothed in a nightgown and in bed when Hopewell entered the bedroom. Hopewell "then tried to yank her [Mrs. Ensenbach] out of bed and tried to take her nightgown off and he was completely naked when he was doing this and Mrs. Ensenbach believes that he had the intent of raping her at the time." Mr. Ensenbach responded to his wife's cries for help and an altercation ensued. Hopewell left the Ensenbach residence in his car and still in the nude. A short while later, Police Officer William Dunker received a call over his radio to go to Alick Drug in Sioux Falls, where there was a report of a nude man inside the store. Upon arrival, Officer Dunker found Petitioner Hopewell in the store totally nude and babbling incoherently. Hopewell then

lunged for Dunker's gun, whereupon Dunker subdued Hopewell, cuffed him, and placed him under arrest. Hopewell was transported by Officers Dunker and Keenan, during which time Hopewell stated he was the King of England and made other nonsensical comments. According to Officer Dunker, Hopewell appeared to be detached from reality. He was lodged under an attempted rape charge based upon Mrs. Ensenbach's report that he attempted to pull her out of bed and tear her nightgown off with the intent of raping her. An application was made by Officer Rivers for emergency commitment to a mental institution based upon the preceding events. Hopewell had been arrested for attempted rape and the case was exceptionally cleared, meaning that after it was submitted to the State's Attorney's office, the criminal charge was not pursued. Arresting Officer Rivers was under the assumption that the criminal charges were dropped on the condition that Hopewell receive evaluation and treatment for mental illness.

In 1990, Petitioner Hopewell ran for circuit judgeship against incumbent The Honorable Gene Paul Kean. In the course of the political campaign, Petitioner Hopewell was interviewed by a newspaper reporter for the Sioux Falls Argus Leader. In the interview, Petitioner Hopewell admitted that he was found nude in a grocery store in 1978, and further explained in the newspaper article:

> It should be noted, however, that it occurred as a result of an hallucinogenic experience induced by my having been surreptitiously drugged with what I'm told is called PCP by a secret agent of a political adversary who was noted for his dirty tricks and unethical behavior, and is

> now very probably allied with Gene Paul Kean and who may well have advanced this information to you for purposes of my campaign embarrassment.

Three days *after* the published account of Hopewell's admission that he was found nude in a drug store, Respondent Midcontinent Broadcasting Corporation, d/b/a Keloland News, broadcast that Hopewell had been arrested for attempted rape in 1978. Respondent Jessica Armstrong obtained the information for the story from two unidentified sources having access to the arrest and case reports of the Sioux Falls Police Department as well as confirming the information with Roger Ensenbach, the husband of the victim. The basis for the news story that Petitioner Hopewell allegedly greeted parishioners at St. Joseph's Cathedral in the nude likewise came from confidential sources. Officer Rivers explained that the original information concerning the St. Joseph Cathedral incident may at one time have existed on a police log indicating that a complaint had come from the St. Joseph's Cathedral area.

Petitioner Hopewell subsequently brought a defamation suit in state court against Respondents Midcontinent Broadcasting Corporation, d/b/a Keloland News, and Keloland News reporters Steve Hemmingsen and Jessica Armstrong for broadcasting during his campaign the story concerning the attempted rape arrest in 1978. In that proceeding, Respondent Dunker signed an affidavit recounting the arrest of Hopewell at Alick Drug. Subsequently, Dunker was deposed in the state court proceeding concerning the affidavit as well as the events of May 28, 1978, leading to Hopewell's arrest.

Petitioner instituted a § 1983 action in October 1993 by service of a summons and complaint naming, among others, Lieutenant William Dunker and City Attorney Janet Brekke. Hopewell amended his complaint on December 2, 1993, adding the City of Sioux Falls as a named defendant. No summons was served upon the City of Sioux Falls perfecting service under the amended complaint.

On January 18, 1994, Petitioner Hopewell filed a second amended complaint, and on February 7, 1994, Hopewell moved the court for leave to file his second and third amended complaint. By order dated February 24, 1994, the federal district court granted Hopewell leave to file his second amended complaint but denied him leave to file his third amended complaint. In essence, Petitioner Hopewell alleged that Respondents Dunker and Brekke violated his constitutional rights by releasing criminal investigation information in the state court proceeding and that unnamed City employees violated his constitutional rights by releasing the same information to Jessica Armstrong of Keloland News during Petitioner's political campaign.

All of the Respondents filed motions to dismiss or in the alternative motions for summary judgment, which were set for hearing by the court for April 25, 1994. Petitioner Hopewell moved for a continuance of the proceedings, which was denied by the court by order dated April 18, 1994. Following hearing, the court granted Respondents' motions for summary judgment on all of the claims, dismissing Petitioner's federal claims with prejudice and dismissing Petitioner's pendant state

claims without prejudice. This order was entered on April 18, 1994.

On May 18, 1994, Petitioner Hopewell appealed the decision of the South Dakota District Court to the United States Court of Appeals for the Eighth Circuit. Following briefing, the Eighth Circuit affirmed the South Dakota District Court's decision and entered judgment in accordance with the opinion of the court on June 5, 1995.

On September 9, 1995, Petitioner Hopewell made application to the Supreme Court of the United States (October 1995 term) for an extension of time in which to file his Petition for Writ of Certiorari. A resistance to Petitioner's motion for enlargement of time was filed on behalf of Respondents Midcontinent Broadcasting, Steve Hemmingsen and Jessica Armstrong on September 12, 1995. On September 13, 1995, this Court allowed Petitioner to submit his Petition for Writ of Certiorari, dated September 5, 1995.

REASONS FOR DENYING PETITION

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT WHERE THE UNRESOLVED ISSUES IN THE CASE WERE PRIMARILY LEGAL RATHER THAN FACTUAL.

The Eighth Circuit properly applied the standard of de novo review in reviewing the district court's grant of summary judgment. The Eighth Circuit examining 42 U.S.C. § 1983 concluded that this section of the Code merely provides "a method for vindicating federal rights elsewhere conferred," *Albright v. Oliver*, 114 S. Ct. 807,

811 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S. Ct. 2689 (1979)). Summary judgment is particularly appropriate when such issues are legal rather than factual. *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

II. THE EIGHTH CIRCUIT FOLLOWED THIS COURT'S DECISION IN DETERMINING THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED IN THIS ACTION.

The Petition for Writ of Certiorari submitted by Petitioner Hopewell sets forth almost verbatim the same argument that he proposed in his Appellant's Brief to the Eighth Circuit. Petitioner fails to argue any error in the decision of the Eighth Circuit Court of Appeals.

The Eighth Circuit addressed Petitioner's alleged constitutional violations in this case: In addressing the equal protection claim, the Eighth Circuit held that this claim failed in that the Petitioner did not identify himself as a suspect classification nor did he show that a fundamental right was infringed upon in this case. Moreover, Petitioner failed to meet equal protection analysis in that he could not show that he was treated differently than others similarly situated. *Abdullah v. Gunter*, 949 F.2d 1032, 1037 (8th Cir. 1991).

As to the Petitioner's substantive due process claim, Petitioner failed to cite any statutes which provide for him a liberty interest in confidentiality of his arrest records. *Bagley v. Rogerson*, 5 F.3d 325, 328 (8th Cir. 1993). Therefore, there are no due process protections to which

he is entitled. Additionally, Petitioner has failed to establish that a fundamental privacy right was somehow violated when his arrest records were disclosed. *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991).

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING A CONTINUANCE UNDER FEDERAL RULE OF CIVIL PROCEDURE 56(f).

The Eighth Circuit, citing *Humphreys v. Roach Biomedical Lab., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993), and *United States Through Small Business Admin. v. Light*, 766 F.2d 394, 397-98 (8th Cir. 1985), held that Petitioner Hopewell, in requesting a continuance, failed to indicate the nature of the additional discovery he sought or how it would help him in arguing against the motion for summary judgment. Therefore, the district court was within its discretion in denying Petitioner's motion for a continuance.

In addition, on February 24, 1994, prior to Petitioner's request for a continuance, the court set forth deadlines for briefing the motion for summary judgment. The court granted all parties ample time to serve their briefs and opposing materials. (*See* Order Fixing Hr'g Date, App. B at 7a.) The court was also within its discretion in setting these deadlines and denying a continuance based on its previous order.

IV. PETITIONER HAS FAILED TO SHOW THAT THE DISTRICT COURT IN ANY WAY ABUSED ITS DISCRETION IN DENYING HIS MOTION FOR LEAVE TO FILE HIS AMENDED COMPLAINT.

While the Rules of Civil Procedure do allow for a party to amend his or her complaint, the Rules also provide that the court can take into consideration successive amendments to plaintiff's complaint.

The district court in this case did allow Petitioner to file an amended complaint. The court was well within its bounds of discretion in denying Petitioner's petition to file a third amended complaint. Not only did Petitioner fail to follow the Local Rule by not attaching the third amended complaint to his motion, but his proposed amended complaint sought only to amplify theories expounded in his original amended complaint. The court was well within its discretion in denying this motion. *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 460 (8th Cir. 1985).

CONCLUSION

Petitioner Hopewell has asked this Court to review the exact same issues that were brought for appeal at the Eighth Circuit level. The Eighth Circuit held that Hopewell had failed to cross the threshold of a § 1983 action and failed to demonstrate a constitutional deprivation to premise his § 1983 action. There was no issue of material fact in the proceedings below, and thus Respondents were entitled to summary judgment as a matter of law. The Eighth Circuit agreed by affirming the district court's

decision. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2286

Richard Hopewell, Appellant, v. William Dunker, Individually and in his capacity as an employee of the City of Sioux Falls, South Dakota; Janet Brekke, Individually and in her capacity as an employee of the City of Sioux Falls, South Dakota; Midcontinent Broadcasting Corporation, doing business as Keloland News; Steve Hemmingsen, Individually and in his capacity as an employee or agent of Midcontinent Broadcasting Corporation; Jessica Armstrong, Individually and in her capacity as an employee of Midcontinent Broadcasting Corporation; City of Sioux Falls, South Dakota, Appellees.	*	Appeal from the United States District Court for the District of South Dakota. [UNPUBLISHED]

Submitted: May 23, 1995

Filed: June 5, 1995

Before WOLLMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

PER CURIAM.

Richard Hopewell appeals from the district court's[1] grant of summary judgment to all defendants in his 42 U.S.C. § 1983 action. We affirm.

In the fall of 1990, Hopewell, an attorney, was a candidate for state court judge in Sioux Falls, South Dakota. On October 26, several weeks before election day, Jessica Armstrong and Steve Hemmingsen, television news reporters for KELO1and News, owned by Midcontinent Broadcasting Corporation (the "media defendants"), aired a story about Hopewell, disclosing the details of Hopewell's arrest on May 28, 1978, on charges that were eventually dropped. Hopewell lost the election. Hopewell brought a state court action for libel against the media defendants, which ended in summary judgment for these defendants.

Hopewell then brought the present action, alleging that the media defendants conspired with unidentified City of Sioux Falls employees to disclose his arrest record and that the disclosure denied him equal protection. Hopewell also alleged that defendants Sioux Falls police

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[1] The Honorable John B. Jones, Senior United States District Judge for the District of South Dakota.

officer William Dunker, city attorney Janet Brekke, and Midcontinent Broadcasting violated his equal protection rights by disclosing the same information in Hopewell's state libel action; and that both disclosures violated his substantive and procedural due process rights. The district court granted summary judgment, finding no constitutional right of Hopewell's implicated.

We review de novo the district court's grant of summary judgment; where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *See Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990). "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Albright v. Oliver*, 114 S. Ct. 807, 811 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979)).

Hopewell's equal protection claims fail. First, he did not identify a suspect classification or an infringed fundamental right. *See MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332 (8th Cir. 1991) (where no suspect class or fundamental right involved, classification is presumed constitutional and subject to only rational basis scrutiny). Second, Hopewell does not explain how he was treated differently from others similarly situated. *See Abdullah v. Gunter*, 949 F.2d 1032, 1037 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1995 (1992) (equal protection plaintiff must show he was similarly situated to others, yet treated differently).

As to Hopewell's substantive due process claims, the disclosure of arrest records, such as those disclosed in the

present case, ordinarily does not infringe upon any fundamental right to privacy. *See Paul v. Davis*, 424 U.S. 693, 713 (1976) (declining to establish fundamental privacy right in one's arrest records); *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3rd Cir. 1991). We also find no basis for Hopewell's contention that the South Dakota statutes he cites gave him a liberty interest in the confidentiality of his arrest records, entitled to procedural due process protections. *See Bagley v. Rogerson*, 5 F.3d 325, 328 (8th Cir. 1993).

The district court did not abuse its discretion in denying Hopewell's Federal Rule of Civil Procedure 56(f) motion for a continuance, as he did not indicate the nature of the discovery he sought or how it would help him. *See Humphreys v. Roche Biomedical Lab, Inc.*, 990 F.2d 1978, 1081 (8th Cir. 1993); *United States Through Small Business Admin. v. Light*, 766 F.2d 394, 397-98 (8th Cir. 1985) (per curiam). Finally, as Hopewell failed to submit his proposed amended complaint with his motion to amend, the district court did not abuse its discretion in denying Hopewell's motion for leave to file his third amended complaint. *See Clayton v. White Hall School Dist.*, 778 F.2d 457, 460 (8th Cir. 1985).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2286

Richard Hopewell,

Appellant,

v.

William Dunker, Individually and in his capacity as an employee of the City of Sioux Falls, South Dakota; Janet Brekke, Individually and in her capacity as an employee of the City of Sioux Falls, South Dakota; Midcontinent Broadcasting Corporation, doing business as Keloland News; Steve Hemmingsen, Individually and in his capacity as an employee or agent of Midcontinent Broadcasting Corporation; Jessica Armstrong, Individually and in her capacity as an employee of Midcontinent Broadcasting Corporation; City of Sioux Falls, South Dakota,

Appellees.

CIV 93-4175

Appeal from the United States District Court for the District of South Dakota.

JUDGMENT

(Filed Jul. 5, 1995)

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 5, 1995

A true copy. /s/ Michael E. Gans MANDATE ISSUE

ATTEST: JUN 28 1995

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

RICHARD HOPEWELL, Plaintiff, -vs- WILLIAM DUNKER, Individually and in his capacity as an employee of the City of Sioux Falls, South Dakota; JANET BREKKE, Individually and in her capacity as an employee of the City of Sioux Falls, South Dakota; MIDCONTINENT BROADCASTING CORPORATION, d/b/a KELOLAND NEWS; STEVE HEMMINGSEN, Individually and in his capacity as an employee or agent of Midcontinent Broadcasting Corporation; JESSICA ARMSTRONG, Individually and in her capacity as an employee or agent of Midcontinent Broadcasting Corporation; and CITY OF SIOUX FALLS, SOUTH DAKOTA, Defendants.	*	CIV 93-4175 ORDER FIXING HEARING DATE (Filed Feb. 24, 1994)

After examination of the record, it appears that plaintiff's Motion of Leave to File Second and Third Amended Complaints, Doc. 20, should be granted as to the Second Amended Complaint and should be denied as to the Third Amended Complaint because of plaintiff's failure to comply with District of South Dakota Local Rule 15.1 by failing to file a copy of the proposed amended pleadings with the motion.

It further appears that a deadline for file and serving motions should be established and a hearing date on all motions should be fixed.

Now, therefore,

IT IS ORDERED:

(1) That plaintiff's Motion for Leave to File Second and Third Amended Complaints, Doc. 20, is granted as to the Second Amended Complaint and is denied as to the Third Amended Complaint.

(2) That all pending motions to dismiss will be treated as motions for summary judgment.

(3) That if any party desires to file and serve additional motions relating to the second amended complaint, such motions and supporting briefs shall be filed and served on or before March 15, 1994; and opposing materials and briefs shall be filed and served on or before April 5, 1994; and reply briefs may be served and filed on or before April 15, 1994.

(4) That if any party desires to file and serve any further briefs or materials relating to motions now pending, such further briefs and materials may be served on or before March 15, 1994, with opposing materials and

briefs to be filed and served on or before April 5, 1994, and with reply briefs to be served and filed on or before April 15, 1994.

(5) That all motions now pending or hereafter filed within the deadlines established herein will be heard on Monday, April 18, 1994 at 2:00 P.M.

Dated this 24th day of February, 1994.

BY THE COURT:

/s/ John B. Jones
Chief Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: /s/ DeAnn Martin
DEPUTY

(SEAL)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

RICHARD HOPEWELL, Plaintiff, -vs- WILLIAM DUNKER, Individually and in his capacity as an employee of the City of Sioux Falls, South Dakota; JANET BREKKE, Individually and in her capacity as an employee of the City of Sioux Falls, South Dakota; MIDCONTINENT BROADCASTING CORPORATION, d/b/a KELOLAND NEWS; STEVE HEMMINGSEN, Individually and in his capacity as an employee or agent of Midcontinent Broadcasting Corporation; JESSICA ARMSTRONG, Individually and in her capacity as an employee or agent of Midcontinent Broadcasting Corporation; and CITY OF SIOUX FALLS, SOUTH DAKOTA, Defendants.	CIV 93-4175 SUMMARY JUDGMENT FOR DEFENDANTS (Filed April 19, 1994)

The Court having entered its Order in this matter and after consideration of the same, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendants' William Dunker and Janet Brekke Motions for Summary Judgment be and the same are hereby granted and Plaintiff Richard Hopewell's claims against said defendants be and the same are hereby dismissed, and it is further

ORDERED, ADJUDGED AND DECREED that Defendants' Midcontinent Broadcasting Corporation d/b/a/ Keloland News, Steve Hemmingsen and Jessica Armstrong Motions for Summary Judgment be and the same are hereby granted and Plaintiff Richard Hopewell's claims against said defendants be and the same are hereby dismissed, and it is further

ORDERED, ADJUDGED AND DECREED that Judgment be and the same is hereby entered dismissing all of Plaintiff Richard Hopewell's federal claims against all defendants with prejudice, and it is further

ORDERED, ADJUDGED AND DECREED that Judgment be and the same is hereby entered dismissing all of Plaintiff Richard Hopewell's pendent state claims without prejudice, and it is further

ORDERED, ADJUDGED AND DECREED that defendants may recover their costs of this action in the amount of _____ to be hereinafter inserted by the Clerk of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that this case be and the same is hereby dismissed.

Dated this 19th day of April, 1994.

/s/ William F. Clayton
WILLIAM F. CLAYTON,
Clerk
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

RICHARD HOPEWELL, Plaintiff, -vs- WILLIAM DUNKER, Individually and in his capacity as an employee of the City of Sioux Falls, South Dakota; JANET BREKKE, Individually and in her capacity as an employee of the City of Sioux Falls, South Dakota; MIDCONTINENT BROADCASTING CORPORATION, d/b/a KELOLAND NEWS; STEVE HEMMINGSEN, Individually and in his capacity as an employee or agent of Midcontinent Broadcasting Corporation; JESSICA ARMSTRONG, Individually and in her capacity as an employee or agent of Midcontinent Broadcasting Corporation; and CITY OF SIOUX FALLS, SOUTH DAKOTA, Defendants.	*	CIV 93-4175 ORDER OF DISMISSAL (Filed Apr. 18, 1994)

All pending motions came on for hearing on April 18, 1994, with the plaintiff appearing by Wendy Allison Nora, and with defendant Dunker et al. appearing by William P. Fuller and with defendant Midcontinent Corp. et al. appearing by Timothy M. Gebhart, and

After arguments of counsel and upon the record,

IT IS ORDERED:

(1) That the plaintiff's Motion for Continuance of Proceedings on Motions for Summary Judgment, Doc. 34, is denied.

(2) That Dunker et al.'s Motion to Dismiss as to the City of Sioux Falls, Docs. 5, 12, 18, and 23, will be treated as a motion for summary judgment and is granted and the plaintiff's claims against said defendants are dismissed.

(3) That Midcontinent Corp. et al's Motion to Dismiss Second Amended Complaint or Alternatively for Summary Judgment, Docs. 3, 14, 19, and 25, will be treated as a motion for summary judgment and is granted and the plaintiff's claims against said defendants are dismissed.

(4) That the Clerk of Courts shall enter judgment dismissing all of plaintiff's federal claims against all defendants with prejudice, and shall enter judgment dismissing plaintiff's pendent state claims without prejudice.

(5) That Defendants' Motion for Sanctions, Doc. 27, is denied.

Dated this 18th day of April, 1994.

BY THE COURT:

/s/ John B. Jones
Chief Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: /s/ Linda M. Ziegler
DEPUTY

(SEAL)

Supreme Court, U.S.
FILED
OCT 27 1995
CLERK

(5)

No. 95-440

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

RICHARD HOPEWELL,

Petitioner,

vs.

WILLIAM DUNKER, JANET BREKKE, JOHN DOE, JANE DOE, JOHN ROE, JANE ROE, MIKE MOE, MARY MOE, individually and in their capacities as employees of the City of Sioux Falls, CITY OF SIOUX FALLS, MIDCONTINENT BROADCASTING CORPORATION DBA KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG and VARIOUS OTHER UNIDENTIFIED PERSONS, individually and in their capacities as employees and agents of Midcontinent Broadcasting Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF IN OPPOSITION

DAVENPORT, EVANS, HURWITZ & SMITH
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Attorneys for Respondents Midcontinent, Hemmingsen and Armstrong
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QUESTIONS PRESENTED

1. Does this case present issues appropriate for this Court's review under a writ of certiorari?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1995

RICHARD HOPEWELL,

Petitioner,

vs.

WILLIAM DUNKER, JANET BREKKE, JOHN DOE, JANE DOE, JOHN ROE, JANE ROE, MIKE MOE, MARY MOE, individually and in their capacities as employees of the City of Sioux Falls, CITY OF SIOUX FALLS, MIDCONTINENT BROADCASTING CORPORATION DBA KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG and VARIOUS OTHER UNIDENTIFIED PERSONS, individually and in their capacities as employees and agents of Midcontinent Broadcasting Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

SUPPLEMENTAL BRIEF IN OPPOSITION

INTRODUCTION

Since the Petition for Writ of Certiorari was filed, the South Dakota Supreme Court issued a unanimous decision in *Hopewell v. Midcontinent Broadcasting Corp.*, No. 18695 (S.D. Oct. 18, 1995), reproduced in Appendix 1. This Supplemental Brief is submitted in accordance with Rule 15.8 in light of this decision.

ARGUMENT

The Petition for Writ of Certiorari asserts Petitioner's civil rights were violated because Respondents Midcontinent Broadcasting Corporation, d/b/a KELOLAND News, Steve Hemmingsen and Jessica Armstrong (hereafter "KELO News") obtained and broadcast information that he was arrested for attempted rape in May 1978. These same allegations were the basis of a state defamation action. See Appendix at 2a-4a. In ruling in favor of KELO News in that case, the South Dakota Supreme Court stated:

> Hopewell said some nasty things about [his election opponent], which were not true. Jessica Armstrong and Steve Hemmingsen broadcast same nasty things about Hopewell on KELO TV, **which were true.**

Id. at 2a (emphasis added) (footnotes omitted). This determination dooms Petitioner's claims.

In *Codd v. Velger*, 429 U.S. 624 (1977), a probationary police officer brought a civil rights action claiming he lost his job because allegedly derogatory information was placed in his personnel file. This Court said:

> Nowhere in his pleadings or elsewhere has respondent affirmatively asserted that the report [in his file] was substantially false. Neither the District Court nor the Court of Appeals made any such finding. When we consider the nature of the interest sought to be protected, we believe the absence of any such allegation or finding is fatal to respondent's claim under the Due Process Clause[.]

429 U.S. at 627. Various other courts have also recognized that in a 42 U.S.C. § 1983 action predicated on alleged damage to reputation or invasion of privacy the plaintiff must show a **false** statement. *See, e.g., Blackburn v. City of Marshall*, 42 F.3d 925, 935-36 (5th Cir. 1995); *San Jacinto Savings & Loan v. Kacal*, 928 F.2d 697, 701 (5th Cir. 1991); *Jacobs v. Dujmovic*, 752 F. Supp. 1516, 1521 (D. Colo. 1990), *aff'd per curiam*, 940 F.2d 1392 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 123 (1992).

Here, the South Dakota Supreme Court specifically determined the statements at issue "were true." There is no basis for Petitioner to assert that true statements made while he was seeking public office violated his civil rights.

CONCLUSION

Because the information obtained and broadcast by KELO News was true, Respondents Midcontinent Broadcasting Corporation, d/b/a KELOLAND News, Steve Hemmingsen and Jessica Armstrong request the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Timothy M. Gebhart*
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Attorneys for Respondents Midcontinent Broadcasting Corporation, Steve Hemmingsen and Jessica Armstrong
* Counsel of Record

APPENDIX

#18695-a-GORS, Circuit Judge

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
* * * *

RICHARD HOPEWELL,

Plaintiff and Appellant,

v.

MIDCONTINENT BROADCASTING CORPORATION d/b/a KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG, JOHN DOE A, JOHN DOE B, JOHN DOE D and JOHN DOE E,

Defendants and Appellees.

* * * *

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA
* * * *

THE HONORABLE JOHN K. KONENKAMP
Judge
* * * *

RICHARD HOPEWELL — Pro se appellant.

TIMOTHY M. GEBHART of
Davenport, Evans, Hurwitz & Smith
Sioux Falls, South Dakota — Attorneys for defendants and appellees.

* * * *

CONSIDERED ON BRIEFS
ON APRIL 25, 1995
OPINION FILED OCT 18 1995

GORS, Circuit Judge

FACTS

In 1990, Richard Hopewell ran for Second Circuit judge in Sioux Falls against the incumbent, Gene Paul Kean. Hopewell said some nasty things[1] about Judge Kean, which were not true. Jessica Armstrong and Steve Hemmingsen broadcast some nasty things about Hopewell on KELO TV, which were true[2]. KELO ran this news story at 6 p.m. on October 26, 1990:

> [E]arlier this week 53-year-old Richard Hopewell admitted he spent 10 minutes in Alick Drug in the buff because someone slipped him PCP. KELO-Land News has learned Hopewell ended up being arrested that same day for attempted rape. Records indicate Hopewell walked into an acquaintance's house in north Sioux Falls. While

---

1 Hopewell claimed that Judge Kean's campaign was financed by big money interests. Hopewell publicly accepted and announced the names and amounts of campaign contributions and challenged Judge Kean to do the same. Hopewell criticized Judge Kean's sentencing practices and called Kean a "judicial reactionary" who made criminal appointments based on patronage rather than competency. Hopewell criticized Judge Kean's handling of the Yarnall case. See, Yarnall v. Yarnall, 460 N.W.2d 161 (S.D. 1990). Hopewell's statements and actions were violations of the Rules of Professional Conduct and the Code of Judicial Conduct. Matter of Discipline of Hopewell, 507 N.W.2d 911 (S.D. 1993).

2 See, footnote 8, infra.

> the man was on the phone downstairs, Hopewell allegedly started to pull the man's wife out of bed and started to disrobe her. After being forced from the house, sources say Hopewell headed to St. Joseph's Cathedral where he allegedly greeted parishioners in the nude. Hopewell was later arrested for attempted rape and the next day was taken to Yankton State Hospital on an emergency mental commitment, so the case has been dismissed.
>
> * * *
>
> Sources also tell us Hopewell's conduct has been investigated by the Bar Association, which is responsible for monitoring attorneys' action, but those investigations and the results of them are confidential.

KELO ran a follow-up story at 10 p.m. the same evening:

> Dick Hopewell, the Sioux Falls lawyer who's running for judge, tonight categorically denies the latest information about his past, a story that started with his admission that he walked naked into [a] Sioux Falls drug store 12 years ago. KELO-Land News has learned there is more to that incident, including an arrest for the alleged attempted rape of a woman acquaintance in her home. After being run out of the house, according to our sources, Hopewell turned up still naked at St. Joseph's Cathedral. Our sources tell us the matter was dropped when Hopewell was

> taken to a mental hospital on an emergency commitment.
>
> Hopewell tells us tonight it's all prevarication and distortion, that is, lies.

Hopewell lost the election[3] and his license[4]. Hopewell sued KELO[5]. Circuit Judge John K. Konenkamp granted summary judgment from which Hopewell appeals. We affirm.

Hopewell listed thirty issues in his docketing statement and twelve in his pro se brief. This appeal boils down to two issues.

CONFIDENTIALITY OF NEWS SOURCES

The first issue is whether the trial court should have compelled Armstrong to divulge the sources of the information contained in the broadcasts.

---

[3] 33,793 votes for Judge Kean to 6,506 votes for Hopewell. Official Election Returns and Registration Figures for South Dakota, General Election November 6, 1990, published by Joyce Hazeltine, South Dakota Secretary of State.

[4] Matter of Discipline of Hopewell, 507 N.W.2d at 918. Reinstatement was denied. Matter of Hopewell, 529 N.W.2d 578 (S.D. 1995).

[5] Midcontinent Broadcasting Corporation d/b/a Keloland News, Steve Hemmingsen, Jessica Armstrong, John Doe A, John Doe B, John Doe D and John Doe E.

"Shield laws" protect journalists from being required to divulge confidential sources of information. "Absolute" shield laws prevent compelled disclosure in all situations. A "qualified privilege" protects confidential news sources under certain circumstances and requires disclosure under other circumstances. South Dakota does not have a shield law and Armstrong has not requested absolute protection against compelled disclosure. Since there are times when disclosure may be appropriate[6] or necessary[7], we decline to adopt an absolute privilege. However, news sources may be subject to harassment or more serious danger if their identity is disclosed. In addition, journalists should not have to prepare a litigant's case. Therefore, we also decline to hold there is no privilege and thus leave journalists and their sources with no protection. Therefore, we hold that a "qualified privilege" protects confidential news sources from disclosure under certain circumstances.

We adopt the five factors set out in Mitchell v. Superior Court (Synanon Church), 690 P.2d 625, 632-35 (Cal. 1984), for trial courts to consider when deciding whether to compel disclosure.

---

[6] In criminal proceedings, the interest of the public in law enforcement and the defendant in discovering exculpatory evidence may outweigh the journalist's need for confidentiality. Our decision in this case relates to civil litigation only.

[7] Disclosure of the confidential source may be the only way to obtain the evidence.

(1) NATURE OF THE LITIGATION. Disclosure is more appropriate if the news person is a party (not merely a witness), particularly in libel cases.

(2) RELEVANCE. The information must go to the heart of the lawsuit.

(3) ALTERNATIVE SOURCES. The plaintiff must exhaust all alternative methods of getting the information.

(4) IMPORTANCE OF CONFIDENTIALITY. In matters of great public importance where the risk of harm is substantial, the court should protect confidential informants who fear exposure and retaliation if they reveal criminal and unethical conduct to the public even if the plaintiff has no other way to obtain the information.

(5) THE STATEMENT IS FALSE. The plaintiff must make a prima facie showing that the statement is false.

Hopewell wanted to know who told Armstong about the incident at St. Joseph's Cathedral.

Application of the first factor, the nature of the litigation, favors disclosure in this libel action. Armstrong was a defendant, not merely a witness. However, disclosure is not automatic in libel cases.

The second factor, relevance, also favors disclosure. The information sought must go to the heart of the matter. Here, the informant's reliability and Armstrong's efforts to

verify the information were central to proving actual malice.

Scrutiny of the third factor, alternative sources, favors confidentiality. At the time of his motion, Hopewell had not attempted any other discovery. The trial court gave him an opportunity to try other sources. Although Hopewell subsequently deposed two police officers, he failed to exhaust all alternative sources of obtaining the information.

Consideration of the fourth factor, the importance of confidentiality, favors protection of the source. A judicial election is a matter of great public concern. Integrity is a primary factor in selecting a judge. The information in the news story was important to the electorate in weighing the credibility of Hopewell and his campaign. Sources of information about criminal and unethical behavior need the press and the courts to protect them from exposure and possible retaliation.

Resort to the fifth factor, whether the statement is false, tips the balance in favor of confidentiality. If analysis of the first four factors remains close, the trial court may require the plaintiff to make a prima facie showing that the statement is false before discovery is ordered. Hopewell failed to show the statement was false.[8]

---

[8] In fact, the broadcasts were substantially true. The evidence before Judge Konenkamp established that if a few minor details were removed or corrected, the broadcast was essentially correct. Hopewell had already admitted the most damning allegation in the KELO story in a statement given to the Sioux Falls Argus Leader, the largest circulating

Hopewell was afforded the opportunity to move for disclosure of the sources again if he made the requisite showings. He did not.

DUE PROCESS

The second issue is whether Hopewell was afforded due process.

Hopewell claims the trial court denied him due process and an open forum. Apparently, Hopewell equates the "open courts" provision of Section 20 of Article VI of the South Dakota Constitution with winning. The court was open to Hopewell and his suit. Every case has a loser and Hopewell lost this one.

The record in this case is voluminous. There are 738 pages in the two separate volumes of the file plus another volume of miscellaneous filings and briefs. There are four

---

newspaper in South Dakota, on October 23, 1990, just three days before the broadcast:

> It's true I was found nude at the Alick Drug. It should be noted, however, that it occurred as a result of an hallucinogenic experience induced by my having been surreptitiously drugged with what I'm told is called PCP by a secret agent of a political adversary who was noted for his dirty tricks and unethical behavior, and is now very probably allied with Gene Paul Kean and who may well have advanced this information to you for purposes of my campaign embarrassment.

Matter of Discipline of Hopewell, 507 N.W.2d at 913.

amended indexes. There are seven separate transcripts. Hearings were held before Judge Srstka on December 18, 1991 (on a motion to dismiss for failure to prosecute by Hopewell), and before Judge Konenkamp on July 23, August 17, and October 15, 1993, and January 4, 1994.

Judge Konenkamp was patient and polite in difficult circumstances and bent over backwards to ensure that Hopewell was afforded due process. Hopewell was given every opportunity to be heard. Summary judgment was only granted when Hopewell made no showing of actual malice[9] to generate a genuine issue of material fact to support a trial on his libel claims. Janklow v. Viking Press, 459 N.W.2d at 419; Wilson v. Great Northern Railway Company, 83 S.D. 207, 157 N.W.2d 19 (1968).

DECISION

The trial court's summary judgment for KELO is affirmed.

MILLER, Chief Justice, and SABERS and GILBERTSON, Justices, and JOHNS, Circuit Judge, concur.

GORS, Circuit Judge, for AMUNDSON, Justice, disqualified.

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[9] Hopewell needed to produce evidence that would support a reasonable jury finding of actual malice by clear and convincing evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Janklow v. Viking Press, 459 N.W.2d 415, 419 (S.D. 1990).

JOHNS, Circuit Judge, for KONENKAMP, Justice, disqualified.